VIRGINIA LAW REGISTER

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All Communications should be addressed to the PUBLISHERS

Judge Martin P. Burks.

The appointment by Governor Stuart of Professor Martin P. Burks to succeed Judge George M. Harrison, retired, upon our Supreme Court of Appeals meets with well nigh universal approbation. Many of us had our choice amongst the able lawyers named for this important position, but whilst naturally regretting that the choice of the Governor did not fall upon a "favorite son," no one can fail to bear cheerful testimony to the ability, worth and splendid talents of the appointee.

Judge Burks is a lawyer of the highest class, of an excellent judicial temperament, and of marked literary ability. His legal training both as a practitioner with his distinguished father, the late Judge Edward C. Burks, and as Professor of Law at Washington & Lee University, has been much added to by his many years service as Reporter of our Supreme Court—a position he has held since January, 1895.

He comes to the bench, therefore, as well equipped as any man could well be, and we anticipate from him opinions marked by care, precision and a knowledge of the great principles of law elucidated by his thorough study of Virginia cases.

Judge Burks is a native of Bedford County. He was educated in the best schools and a graduate of the great University of Virginia Law School. When his father, Judge Edward C. Burks, retired from the bench of our Supreme Court, he entered into partnership with that distinguished jurist, than whom no keener legal mind ever adorned our judiciary. The younger Burks was always an eager student of the law and soon began to evince his interest in the profession by turning his attention to law writing. His distinguished father was one of the originators of the REGISTER, and his son has been one of its most valuable contributors, unfortunately too infrequently.

As an author his work on the "Separate Estates of Married Women," a work of moderate size, but of great ability, was followed by his larger book on "Virginia Pleading"—a recognized authority in the courts and used as a textbook in our law schools. After some years of successful practice, Judge Burks was called to the Chair of Law in Washington & Lee University, at Lexington, and very soon took high place as a law teacher. He was chosen by the Governor as one of the Revisors of our Code and has been busily engaged on that important work, which we are glad to know he does not propose to abandon. We do not know of another case in this Commonwealth where both father and son have served on our Supreme Bench. We predict that Judge Burks will not prove unworthy of his illustrious sire as a judge, as he has not in every other relation of life.

Automobiles. Principal and Agent.

The New York Court of Appeals—the court of last resort in that state—has lately had before it a case somewhat similar to the case of *Cohen* v. *Meador*, decided September 11th, last, (not yet reported) by our own Supreme Court, and has made a decision in some respects similar to that of our own court. This case has not yet been reported but is, in a few words, as follows:

An adult son was using his father's car with his father's consent, but was "pursuing solely and exclusively his own pleasure, not any object of family entertainment or convenience." The machine driven by the son struck and killed a person and the father was sued by the representative of the dead man's estate, the contention being that the father was owner of the machine and therefore principal, the rule of principal and agent being attempted to be applied to this case. But the court held that the son—although a member of his father's family—could not be considered in the present case as his agent, even if the automobile was to be treated when carelessly used as more dangerous than other articles that afford pleasure.

"This is an advanced proposition in the law of principal and agent," said the court, "and the question which it presents

really resolves itself into the one whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use and occasionally permits a capable son to use it for his individual convenience ought to be regarded as having undertaken the occupation of entertaining the latter and to have made him his agent in this business, although the act being done is solely for the benefit of the son. * * * But it seems to us that such a theory is more illusory than substantial, and that it would be far-fetched to hold that a father should become liable as principal every time he permitted a capable child to use for his personal convenience some article primarily kept for family use. That certainly would introduce into the family relationship a new rule of conduct which, so far as we are aware, has never been applied to other articles than an automobile.

"We have never heard it argued that a man who kept for family use a horse or wagon or boat or set of golf sticks had so embarked upon the occupation and business of furnishing pleasure to the members of his family that, if some time he permitted one of them to use one of these articles for his personal enjoyment, the latter was engaged in carrying out not his own purposes, but, as agent, the business of his father.

"It seems to us that the present theory is largely due to the thought that because an automobile may be more dangerous when carelessly used than any of the other articles mentioned, there ought to be a larger liability upon the part of the owner, and to this end an extension of the doctrine of principal and agent in order properly to safeguard its use. * * *

"And in the present case it is in effect argued that because the use of an automobile upon a highway may be dangerous and therefore is a privilege subject to license by the State, the courts can apply a different rule of agency to its use than would or could be applied to the case of the other articles which have been mentioned. This kind of argument, as it appears to us, discloses the novelty and weakness of the proposition which is being urged upon us. It seems to disclose the idea, as an essential part of the argument, that because an automobile is different than a horse or boat, some advanced rules ought to be applied to its use. But the rules of principal and agent are not thus to be formulated. They are believed to be constant and not variable in response to the supposed exigencies of some particular situation.

"The question whether one person is the agent of another in respect of some transaction is to be determined by the fact that he represents and is acting for him rather than by the consideration that it will be inconvenient or unjust if he is not held to be his agent. If, contrary to ordinary rules, the owner of a car ought to be responsible for the carelessness of every one whom he permits to use it in the latter's own business, that liability ought to be sought by legislation as a condition of issuing a license rather than by some new and anomalous slant applied by the courts to the principles of agency."

Very early in the history of automobiles the courts took the view that because the automobile might be more dangerous than ordinary vehicles upon the public highways, no greater liability was thereby imposed upon the owner and operator. See *Cohen* v. *Meador, supra*. Huddy on Automobiles (4th Ed.) Sec. 29. This view we at one time were disposed to criticise, but on calmer consideration we came to the conclusion that it was supported by reason if not by analogy. Certainly a contrary view would stretch the law to a much greater extent than any court should allow itself to do.

The most remarkable thing about the case under discussion is that any lawyer was found to seriously contend that under the circumstances as related, the law of principal and agent should have the slightest application.

The West Virginia Debt Case. Can the Supreme Court of the United States Issue a Mandamus against a State Legislature?

At the first blush, most of us would answer this question in the negative. A few of us trained in the old doctrine of extreme State Rights would deny with much emphasis the right of the Supreme Court of the United States to compel a sovereign State to do anything. The very thought of the governing body of such a State being threatened with imprisonment if it did not obey a mandate to levy a tax, seemed so utterly abhorrent that merely to state it was to answer it in the negative. But upon consideration of the pecu-

liar facts of the West Virginia case some thoughts arose which might alter even the mixed opinion of the most advanced States Rights man. The Constitution of West Virginia—the Supreme Law of the State—recognized that West Virginia was indebted to the State of Virginia. The Constitution of the United States gave express jurisdiction to the Supreme Court of the United States in suits between the sovereign states. To this extent the states surrendered that sovereign right not to be sued. The State of West Virginia appeared in the Supreme Court of the United States and defended the action brought against it by the State of Virginia—thus submitting itself to the jurisdiction of that court and recognizing that the court had the right to hear and determine the cause and render judgment.

To this extent it surrendered its sovereignty, and having thus done so, did it not surrender all sovereignty which stood in the way of the enforcement of the mandate of that court in the matter thus submitted to it? And its legislative body—the only tribunal which could provide for the payment of the debt—then occupied no higher position than the supervisors of a county, or the council of a city, both parts of the governmental functions of the sovereign, but both of which have heretofore had the writ of mandamus issued against them to compel them to levy a tax to pay a debt justly due.

The "Bone-Dry" Law.

The recent Act of Congress, known as the "Bone-Dry" Law, provides:

"That no letter, postal card, circular, newspaper, pamphlet, or publication of any kind containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind, or containing a solicitation of an order or orders for said liquors, or any of them, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier, when addressed or directed to any person, firm, corporation, or association, or other addressee, at any place or point in any State or Territory of the United States at which it is by the law in force in the State or Territory at that time unlawful to advertise or solicit orders for such liquors, or any of them, respectively.

"If the publisher of any newspaper or other publication or the agent of such publisher, or if any dealer in such liquors or his agent, shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and for any subsequent offense shall be imprisoned not more than one year. Any person violating any provision of this section may be tried and punished, either in the district in which the unlawful matter or publication was mailed or to which it was carried by mail for delivery, according to direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed. Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State: Provided further, That the Postmaster General is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of States in which it is unlawful to advertise or solicit orders for such liquors."

The material provision of the Act is that it shall be unlawful for any person to order, purchase or cause intoxicating liquors to be transported in interstate commerce into any state or territory, the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes.

The Supreme Court of the United States has consistently held that intoxicating liquor is a legitimate article of interstate commerce, and subject to the control of Congress. This excluded the power of the states, and caused Congress to enact the Wilson and Webb-Kenyon Acts, in order that the states should have greater powers to control and prohibit the importation, sale and use of intoxicating liquors. Both of the above acts operate by permitting the states to legislate upon a subject of interstate commerce. In enacting the "Bone-Dry" Act Congress directly

prohibits the transportation of intoxicating liquors in interstate commerce. The Supreme Court has several times held that Congress under its power to regulate can prohibit interstate commerce.[1] It seems to be settled that Congress can prohibit such commerce. But it may be asked, can Congress, under the power to regulate, prohibit interstate commerce under any and all circumstances? It would seem not, for the purpose of vesting the power to regulate such commerce in Congress is to facilitate and not to burden or prohibit it. Regulation does not mean prohibition. Congress may prohibit interstate commerce, when acting under some other power, as by enacting embargo acts to safeguard the nation. In the present instance, Congress attempts a police regulation, as to which the Constitution gives it no power to act. The object and purpose of the "Bone-Dry" Act is neither the regulation nor the prohibition of interstate commerce, but a pure police regulation.

Interstate commerce embraces traffic and intercourse for purposes of trade between citizens of different states in any and all forms.[2] A railroad, express company or other common carrier engaged in the transportation of persons or freight from one state to another is engaged in interstate commerce. If intoxicating liquor is shipped by such carrier, it is transported in interstate commerce within the meaning of the Act, as concerns the carrier. There may be some question as to the liability of a passenger who transports it on his person or in his baggage. He is not necessarily actively engaging in interstate commerce, but is himself, together with his possessions, being so transported. It would seem clear that the passenger would be causing intoxicating liquors to be transported in interstate commerce in violation of the Act.

The acts of ordering or purchasing intoxicating liquors in another state to be shipped into the state in which the negotiations resulting in the ordering or purchasing originate, is interstate commerce.[3]

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1. United States *v.* Marigold, 9 How. 660, 13 L. Ed. 257; Northern Securities Co. *v.* United States, 193 U. S. 197; Lottery Case, 188 U. S. 321, 47 L. Ed. 492; In re Rehrer, 140 U. S. 545, 35 L. Ed. 572.

2. See Gibbins *v.* Ogden, 9 Wheat. 1, 189, 6 L. Ed. 23.

3. See Caldwell *v.* North Carolina, 187 U. S. 622, 47 L. Ed. 336.

The mere act of entering a state does not constitute interstate commerce—there must in addition be traffic or intercourse. If a person should enter the state on foot or in a privately controlled vehicle, not a common carrier engaged in interstate commerce, his act would not constitute interstate commerce and he would not be subject to the control of Congress. The Act easily bears the construction that it is not intended to apply to such transportation. "Transportation" is the carrying, bearing or conveying of a thing from one place to another. The transporting may be done by carrier, by any form of conveyance or vehicle or by person. But it is certainly questionable whether transportation by person or privately controlled vehicle is ordered, purchased or caused to be transported as prohibited by the Act. The Act reads "shall order, purchase, or cause intoxicating liquors to be transported" and not that it shall be unlawful to transport them. On this point the Act is not clear and the meaning of the law must remain in doubt until judicially declared. When construed in connection with other provisions of the Act relating to the use of the mails for ordering and purchasing intoxicating liquors and with the proviso "that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state," it would seem that Congress meant transportation resulting from an order, purchase or other cause and not the immediate act of transporting, otherwise the Act would read "who shall transport." The Act is penal and is to be strictly construed. It would seem beyond the power of Congress to prohibit such transportation and that Congress has not attempted to do so. The state law has full force here, however. The act of transporting is within either one or the other of the two sovereignties.

The Act forbids the transportation of "intoxicating liquors." What are intoxicating liquors is to be determined by giving the terms their ordinary definition, which embraces all liquors which when used as beverages will produce intoxication. The definitions in the Virginia Prohibition Act and the acts of other states do not determine the definition of "intoxicating liquors" as used by Congress. It is necessary to refer to the numerous cases defining the terms.

The Webb-Kenyon Act provides, in substance, that the ship-

ment or transportation, in any manner or by any means whatsoever, into any state, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, intended, by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package, or otherwise, in violation of any law of such state, is prohibited.[4] This act has recently been held constitutional by the Supreme Court of the United States.[5] To what extent is the Webb-Kenyon Act repealed by the act under consideration? The latter applies to transportation into those states and territories which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes. This classification includes all states in which state-wide prohibition is in effect. The Act does not apply to other states. The same is true of the Webb-Kenyon Act. The two acts apply to transportation into the same states. The wording of the two statutes is different, but their operation and effect is over the same subject matter.

The Webb-Kenyon Act is, therefore, repealed by implication by a later act intended to relate to the same subject matter. Congress has resumed the exercise of a power it had, under the Webb-Kenyon Act, permitted the states to have.

The Webb-Kenyon Act contains no penal provision. Its effect is to permit the states to prohibit the importation of intoxicating liquors by legislation which would otherwise be unconstitutional as interfering with interstate commerce. The "Bone-Dry" Act makes the ordering, purchasing or causing intoxicating liquors to be transported in interstate commerce unlawful and an offense against the United States. The two acts are intended to effect similar objects, but by different methods; the Webb-Kenyon Act by permitting the state to act, and the "Bone-Dry" Act by positive action by the United States.

The Wilson Act is also repealed as to its operation in the states to which the "Bone-Dry" Act applies, for the same reasons that the Webb-Kenyon Act is repealed.

The statutes of the different states enacted under the power given by the Webb-Kenyon and Wilson Acts are repealed to

4. Act of Cong. March 1, 1913.

5. James Clark Distilling Co. v. Western Maryland Ry. Co. (U. S.), 37 Sup. Ct. Rep. 180.

the same extent that such acts are repealed. A violation of the act of Congress cannot, also, be a crime against the state, for the reason that by assuming to control the subject of transportation in interstate commerce, Congress excludes the power of the state. The state cannot act until the transportation in interstate commerce has ceased and the offender or the intoxicating liquor has become subject to state sovereignty.

The Act prohibits transportation in interstate commerce only. It does not mention foreign commerce. Intoxicating liquors may still be transported in foreign commerce, for interstate commerce does not embrace foreign commerce. The Constitution itself distinguishes the two.

It may be questioned whether the law makes the mere acts of ordering or purchasing intoxicating liquors unlawful where no transportation actually results therefrom. Is it unlawful to order or purchase intoxicating liquors to be transported where transportation does not actually take place? It would seem that the mere acts of ordering and purchasing are made offenses, if done for the purpose of resulting in transportation in the manner prohibited. If the completed act requires steps to be taken by citizens in different states it amounts to interstate commerce.

The common-law rule that an arrest or seizure can be made only by an officer acting under a warrant, with certain exceptions, applies to the enforcement of an act of Congress. The United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [6]

The provision relating to venue applies to publishers of newspapers and other periodicals, dealers in liquors and their agents only and not to persons violating the provision against ordering, purchasing or causing intoxicating liquors to be transported in interstate commerce. The venue of the offense is to be determined without reference to the provision.[7]

The act will take effect July 1. 1917. T. B. B.

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6. IV. Amendment.

7. See Judicial Code, §§ 40, 42, 53. See, also, 2 Va. Law Rev. 1.